No. 09-1476

IN THE

Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PENNSYLVANIA AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Pennsylvania is one of its state affiliates. Since its founding in 1920, the ACLU has participated in numerous cases before this Court involving First Amendment issues, including *McDonald* v. *Smith*, 472 U.S. 479 (1985), as direct counsel and as *amicus curiae*. The proper resolution of this case is therefore a matter of significant concern to the ACLU and its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

In February 2003, the Duryea Borough Council fired respondent Charles Guarnieri from his position as chief of police. Pet. App. 4a, 57a. Guarnieri filed a grievance challenging his termination and the arbitrator ordered that he be reinstated. *Id.* When Guarnieri returned to work, the Borough Council issued a set of directives concerning Guarnieri's performance of his duties as police chief. *Id.* at 4a, 57a-59a. After another proceeding, the arbitrator ordered the Council to modify or delete some of the directives. *Id.* at 4a, 59a-60a.

In July 2005, Guarnieri filed suit against the Borough, alleging that it had retaliated against him

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[1] No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have filed general consents to the filing of briefs *amicus curiae* with the Clerk.

for challenging his termination through the collective bargaining agreement's grievance and arbitration process. Pet. App. 4a-5a. That process is authorized by and enforceable under state law. See Police and Fireman Collective Bargaining Act ("Act 111"), 43 Pa. Stat. Ann. §§ 217.1-.10, 211.6; *Pa. State Police* v. *Pa. Troopers Ass'n*, 741 A.2d 1248 (Pa. 1999). After Guarnieri filed this lawsuit, the Borough wrongly denied him overtime and then refused to pay the overtime despite a Department of Labor decision requiring it to do so. Joint Appendix ("J.A.") 109-10. Guarnieri thus amended his federal complaint to allege that the Borough had also retaliated against him for filing the instant lawsuit. *Id.* at 100.

If a citizen of the Borough of Duryea were to file a judicial or administrative complaint against the Borough – including a complaint about a matter of private rather than public concern – any Borough retaliation for that filing would violate the petition clause of the First Amendment of the United States Constitution. See *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("[t]he right of access to the courts is indeed but one aspect of the right of petition"); *id.* at 511 (petition right includes complaints "respecting resolution of . . . business and economic interests"). The question presented in this case is whether the "realities of the employment context," *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008), somehow outweigh "the basic concerns of the [petition clause]," *id.*, and require this Court to deny citizens who are also public employees their constitutional right to invoke the state's adjudicatory processes to address private matters, including employment-related complaints. The answer to that question is no.

Public employees do not forfeit constitutional rights, including the First Amendment right to petition the government for redress of grievances, by accepting public employment. See *Smith* v. *Ark. State Highway Emps.*, 441 U.S. 463, 465 (1979) (per curiam) (citing *Pickering* v. *Bd. Of Educ.*, 391 U.S. 563, 574-75 (1968)). Instead, they are presumed to retain those rights, particularly where "the asserted employee right implicates the basic concerns of the relevant constitutional provision," unless the government demonstrates that its interests in operating an efficient workplace justify specific limits on public employees' rights. *Engquist*, 553 U.S. at 600.

This case involves a core concern of the First Amendment's right of petition – the right of access to the state's adjudicatory processes. The exercise of this aspect of the right of petition implicates not only the petition clause, but also the due process clauses of the Fifth and Fourteenth Amendments and the privileges and immunities clause of Article IV of the Constitution. See *Tennessee* v. *Lane*, 541 U.S. 509, 518, 523 (2004). By virtue of these constitutional provisions, "'going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer.'" *Bill Johnson's Rests.* v. *NLRB*, 461 U.S. 731, 741 (1983). "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers* v. *Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907). Allowing the government to punish a public employee for invoking the state's own adjudicatory mechanisms clearly "implicates the basic concerns of" the right of petition. *Engquist*, 553 U.S. at 600.

That is why *McDonald* v. *Smith*, 472 U.S. 479 (1985), does not decide this case. *McDonald* involved a component of the petition right that is virtually identical to the free-speech right. There were no constitutional or practical concerns that made it inappropriate for the Court to apply its libel and defamation limits on the free-speech right to the exercise of the petition right at issue. Because Guarnieri invoked the state's adjudicatory processes, however, his exercise of the petition right involves constitutional and practical concerns that make it wholly inappropriate to apply *Connick* v. *Myers*' public-interest prerequisite to the protection of public-employee free speech. See 461 U.S. 138, 147 (1983). Those distinct concerns include the effectiveness and integrity of the state's prescribed processes for the neutral adjudication of disputes, the public interest in and general applicability of the legal outcomes of those state processes, and the absence of any true operational interest in retaliating against employees who use the processes that state law instructs them to use. This Court thus must conduct a different balancing process specific to the petition right and free-speech limitations at issue here.

When the Court does so, it should conclude both that this case involves the "basic concerns" of the petition right and that the "realities of the employment context" do not require that public employees forfeit the right to invoke the state's adjudicatory processes for resolution of their allegedly private complaints. There is no background principle of law or presumption that employers are authorized to retaliate against employees who call upon the state's adjudicatory processes. The opposite is true. Federal and state laws generally forbid

employers to retaliate against employees for filing formal complaints about work-related wrongs. This virtual unanimity exists because such retaliation deeply undermines the purpose and effect of an adjudicatory system. In fact, such reprisal is fundamentally inconsistent with a law establishing an adjudicatory system. Employers do not have – or need – the power to retaliate against employees who file formal workplace-related complaints in order to "effectively and efficiently" operate the workplace. *Waters* v. *Churchill*, 511 U.S. 661, 671-72, 674-75 (1994) (plurality opinion).

Indeed, this Court has already held that private employers and employees have a constitutional right to petition the government by invoking judicial and administrative processes to address private matters related to employer-employee relations, rejecting claims that the petition right is outweighed by other interests and concerns. See, *e.g.*, *Bill Johnson's Rests.*, 461 U.S. at 741; *United Mine Workers* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967); *Bhd. of R.R. Trainmen* v. *Virginia*, 377 U.S. 1 (1964). In *Bill Johnson's Restaurants*, for example, this Court held that the employer's exercise of its constitutional right of access to the courts could not be condemned as an unfair labor practice, even when the object of the employer's suit was to prevent an employee from exercising a *federally-protected right*. 461 U.S. at 741. Fundamental fairness dictates that if an employer's right of access to the state's adjudicatory processes to address employment-related claims is so important that it cannot be limited even to protect a federal statutory right, then a public employee's right of access for the same purpose *cannot* be limited based on "the realities of the employment context." The decision below should be affirmed.

ARGUMENT

Public employees do not forfeit constitutional rights by accepting public employment. As explained in *O'Hare Truck Serv.* v. *City of Northlake*, 518 U.S. 712, 716-17 (1996):

> The Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights, a doctrine once captured in Justice Holmes' aphorism that although a policeman "may have a constitutional right to talk politics . . . he has no constitutional right to be a policeman," *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892). A State may not condition public employment on an employee's exercise of his or her First Amendment rights. [*Id.* (citing *Keyishian* v. *Bd. of Regents*, 385 U.S. 589 (1967); *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593 (1972))].[2]

Thus, like all citizens, public employees have First Amendment rights, including the right to petition. See *Smith*, 441 U.S. at 465 ("the public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so").

Amici recognize that this Court has found that constitutional rights are not identical for public employees and persons acting as citizens. See, *e.g.*, *Engquist*, 553 U.S. at 599. Yet, in determining how constitutional rights apply differently to public employees, this Court has carefully engaged in

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[2] *See also Bd. of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 674-75 (1996) (collecting cases).

context-specific balancing, considering the nature of the constitutional right, the purposes it serves, and the government's interests as government and employer. *Id.* The product of that balancing here strongly favors recognition and enforcement of public employees' rights of access to the state's adjudicatory processes.

First, we examine the nature of the right of petition at issue and the purposes served by its invocation. This examination demonstrates that retaliation against a public employee for use of the state's adjudicatory processes strikes at the heart of the relevant petition clause concerns. Thereafter, we show that the reasons petitioners offer to justify extinguishing public employees' petition rights in these circumstances are plainly insufficient.

I. THE BASIC CONCERNS OF THE RIGHT OF PETITION ARE IMPLICATED WHEN THE STATE RETALIATES AGAINST AN EMPLOYEE FOR INVOKING THE STATE'S ADJUDICATORY PROCESSES.

Some aspects of the First Amendment's right of petition serve constitutional interests distinct from those served by the right of free speech. That is not surprising, considering that the petition right is textually separate from the right of free expression and is grounded in independent constitutional provisions. This case involves a particular aspect of the right of petition – the right to invoke the government's adjudicatory processes. See, *e.g.*, *Bill Johnson's Rests.*, 461 U.S. at 741 ("'going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer'").

Guarnieri's argument is not – as petitioners would have it – that the petition right is older than or superior to the right of free speech, and thus deserves heightened respect and protection. It is instead that this aspect of the petition right – the right to invoke the state's adjudicatory processes – is of a different nature and protects different constitutional concerns than does the free-speech right. It emanates from both the First Amendment and the due process clauses. It protects access to state-prescribed processes and, unlike the free-speech right, is unrelated to the expressive content of the petition (the complaint or claim). It is never purely private, both because it invokes a process which may announce or apply the law in ways that govern the future conduct of others and because the public has a strong interest in the integrity and effectiveness of the state's processes, as well as their availability to all citizens. Here, the asserted employee right "implicates the basic concerns of" the access component of the petition clause. *Engquist*, 553 U.S. at 600. That distinguishes this case from *Connick* and *McDonald*, and mandates enforcement of the public employee's petition right.

A. The Petition Right Protects Access To The State's Adjudicatory Processes To Address Matters Of Private Concern.

1. This Court's decisions establish that the petition right of the First Amendment includes protection of access to the courts and other state adjudicatory processes. See, *e.g.*, *Cal. Motor Transp. Co.*, 404 U.S. at 513 (access to courts and administrative agencies "is part of the right of petition protected by the First Amendment"). Recently, in *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002), this Court characterized "this right to petition [the courts] as one of 'the most

precious of the liberties safeguarded by the Bill of Rights.'" *Id.* at 524-25 (quoting *United Mine Workers*, 389 U.S. at 222).

This Court has also recognized that the right of access to adjudicatory processes is protected by the Fifth and Fourteenth Amendments' due process clauses, see *Tennessee*, 541 U.S. at 523 ("[t]he Due Process Clause also requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings"); *Lewis* v. *Casey*, 518 U.S. 343, 362-63 (1996); *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985); *Boddie* v. *Connecticut*, 401 U.S. 371, 376-77 (1971); and is among the rights protected by the privileges and immunities clause of Article IV, see *Blake* v. *McClung*, 172 U.S. 239, 249 (1898) (privileges and immunities include the right "to institute and maintain actions of any kind in the courts of the state"). This right of access, with its many constitutional underpinnings, forbids governmental conduct that unduly obstructs persons who seek to present complaints to the state's adjudicatory authorities.

Significantly, this Court has also held that the right of access described above extends beyond matters of public concern to matters of private interest. In *California Motor Transport Co.*, 404 U.S. at 511, for example, a group of truckers alleged that a second trucker group was filing baseless, repetitive claims with judicial and administrative agencies to prevent the first group from obtaining operating rights. The Court held that the second group's right to file judicial and administrative claims was protected by the "right of access to the courts" which is "one aspect of the right of petition." *Id.* at 510. The defendants'

petition right included access to these adjudicatory forums even though their claims involved purely private economic matters. See also *Bill Johnson's Rests.*, 461 U.S. at 743 (petition right for employer suit against picketing employees for statements in leaflet alleged to be defamatory).

The Court confirmed the broad scope of the petition right in *United Mine Workers*, 389 U.S. at 221-22. It explained that "in *Trainmen*, where the litigation in question was, as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent, that the principles announced in [*NAACP* v.] *Button* were applicable only to litigation for political purposes." *Id.* at 223 (citation omitted). See also *Bhd. of R.R. Trainmen*, 377 U.S. at 7 ("[t]he State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.").

In sum, the access component of the petition clause serves a number of significant interests unrelated to the expressive content of the petition or complaint. It protects access to state-prescribed processes in which persons can seek redress for their grievances and receive "compensation for violated rights and interests" and "the psychological benefits of vindication [and the] public airing of disputed facts." *Bill Johnson's Rests.*, 461 U.S. at 743. The availability of a dispute resolution process that operates neutrally and dispenses justice is "the alternative of force," and thus "is the right conservative of all other rights." *Chambers*, 207 U.S. at 148. Indeed, the filing of claims in state-prescribed forums always implicates the public interest because

decisions in such matters may announce, interpret or apply law in ways that will affect future conduct and proceedings. All of the "basic concerns" of the petition clause are implicated when the state retaliates against employees for invoking state-prescribed adjudicatory processes.

2. Petitioners and their *amici* seek to obscure the significance of the access component of the petition right by claiming that the right was not primarily addressed to protection of access to the courts and other adjudicatory processes, but was instead focused on access to the legislature. See, *e.g.*, Pet. Br. 27; US Br. 17 n.5. This Court's decisions and the drafting history and English roots of the petition clause refute this claim.

This Court early on recognized the Constitution's solicitude for the right of access to judicial forums. In *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall explained that "[t]he 'very essence of civil liberty' certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . ." See also *Corfield* v. *Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J.) (acknowledging the right "of a citizen of one state . . . to institute and maintain actions of any kind in the courts of the state").

The Court's understanding finds support in the drafting history of the petition clause. When James Madison submitted his first draft of the Bill of Rights to the First Congress in 1789, the proposed right to petition referred to the right to apply "'to the Legislature by petitions, or remonstrances, for redress of their grievances.'" 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 1026

(1971), *quoted in* Carol R. Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 613 (1999). Thereafter, a "Select Committee" of the House of Representatives altered the draft amendments and proposed a version of the right to petition that protected the right "to apply to the government for redress of grievances." House of Representatives Journal (Aug. 1789), *reprinted in* Schwartz, *supra* at 1122, *quoted in* C. Andrews, *supra* at 615. The Senate retained the language referring to petitioning "the government." Senate Journal (Aug.-Sept. 1789), *reprinted in* 2 Schwartz, *supra* at 1149, *quoted in* C. Andrews, *supra* at 618. This revision reflects the Founders' intent to extend the petition right to all three branches of the new federal government. See also James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 961-62 (1997).

Finally, the origins of the petition clause reveal the breadth of its protection. Most relevant here, that history reflects the proposition that the "right to petition" indisputably encompassed the invocation of processes for the adjudication of individual claims.

The clause has its roots in the English Bill of Rights of 1689, which itself was born of the 1688 trial known as the *Seven Bishops Case*, 12 Howell's State Trials 183 (1688). In that case, seven bishops were prosecuted because they lodged an allegedly seditious petition directly with the King. Significantly, during their trial, it appears to have been a point of agreement among the parties that individual petitions seeking relief from the King in his courts or in Parliament were fully protected and only the

prosecution of a public address to the King outside those bodies was at issue. See, *e.g.*, Eric Schnapper, *Libelous Petitions for Redress of Grievances*, 74 Iowa L. Rev. 303, 329-38 (1989) (describing consensus that petitions to courts were fully protected); cf. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2174 (1998) (a "petition was the beginning of an official action, part of a 'course of justice'").

The bishops were acquitted, and the English Bill of Rights that followed was intended to confirm the right of individuals to seek relief for legal injuries from the King directly, as well as through his courts or Parliament, and to forbid reprisals for the filing of such petitions in any forum. Thus, the Bill of Rights declared that "it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal." 1 W. & M. 2d Sess., ch. 2, § 5 (Eng. 1689).[3]

In any event, the petition clause's protection of legislative petitions is wholly consistent with its concern for access to adjudicatory processes. In the England of the Glorious Revolution and in colonial America, citizens often petitioned the legislature to obtain adjudication or neutral resolution of private individual disputes. See C. Andrews, *supra* at 596 (the petition right "historically protected requests for some form of individual redress, even if by the legislature"). "[I]n England and in the colonies, there was no separation of powers as we conceive of that

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[3] While *McDonald* held that requests to executive officials were not absolutely privileged against actions for defamation, 472 U.S. at 486 (Brennan, J., concurring), it did nothing to disturb the settled understanding that the right to petition encompasses the invocation of adjudicatory processes or to approve retaliation against those who invoke them.

doctrine today." *Id.* For that reason, "petitions to the legislature were often judicial in nature," and the legislatures sometimes "performed judicial roles and resolved individual grievances that today would constitute civil actions." *Id.* In addition, "[w]hen early Parliaments received 'judicial' petitions, Parliament often referred petitions back to the common law courts," while also sending "some to the King's chancellor [the origin of the equity jurisdiction of the chancellor]" and acting upon some directly. *Id.* at 598.[4]

Properly understood, the origins and history of the right of petition support this Court's conclusion that it protects the individual's right of access to the government's adjudicatory processes for the resolution of private, individual disputes.

B. The Right of Access And The Free-Speech Right Address Distinct Constitutional Concerns.

Petitioners contend that *McDonald* v. *Smith*, 472 U.S. 479 (1985), stands for the proposition that the petition clause and the free-speech clause serve the

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[4] *See also* Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 Hastings Const. L.Q. 15, 24 (1993) (petitions seeking individual relief based on private grievances were initially referred to special Parliamentary Committees for resolution through quasi-judicial hearings, and eventually went to the nascent court system); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 146 (1986) (in pre-revolutionary America, the petition right included individual complaints about mundane, private matters, often directed to the legislature); Katherine Shea, San Filippo v. Bongiovanni: *The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 Vand. L. Rev. 1697, 1701 (1995) (same).

same constitutional interests, and therefore that limits imposed on the exercise of free-speech rights must also be imposed on the petition right. In *McDonald*, this meant that the right to petition was subject to the state libel law's penalties for false and damaging statements, just as the free speech would have been. Here, petitioners say, this means that a public employee's petition is protected only if it addresses a matter of public concern, just as a public employee's speech would be. The analogy does not work.

As shown above, the right to invoke the state's formal adjudicatory mechanisms implicates constitutional concerns different from those addressed by the free-speech right. The law already recognizes the significance of these differences: Certain statements in court proceedings cannot form the basis of libel or defamation suits, even if those statements made out of court would be grounds for a tort, see *Imbler* v. *Pachtman*, 424 U.S. 409, 426 n.23 (1976); and baseless lawsuits may be punished, even if the same statements made elsewhere would be protected by the free-speech rights. See *Cal. Motor Transp. Co.*, 404 U.S. at 512; *Bill Johnson's Rests.*, 461 U.S. at 742-43 (access right protects only "well-founded" lawsuits that have a "reasonable basis" in fact or law). Of course, some limits on public employees' access to the courts are appropriate – but they are the constitutionally permissible limitations on litigation (*e.g.*, the absence of protection for frivolous litigation, see *Prof'l Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 65 (1993); Fed. R. Civ. P. 11), not the limits on free speech.

Put differently, the balance this Court struck in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964),

worked in *McDonald*. The government regulatory and policy interests supporting enforcement of defamation laws were the same in *New York Times* and *McDonald*: The state sought to provide remedies for those who suffered reputational harm and to prevent misinformation through tort liability. 472 U.S. at 484. The countervailing interests supporting free speech, too, were similar: The statements concerned a public figure and a matter of public importance. *Id.*

In contrast, at stake here are interests that do not directly correspond to those served by the free-speech right. Most notable is the state's ability to provide effective adjudicatory processes for the vindication of legal rights that are perceived as just and neutral – "the right conservative of all other rights [which] lies at the foundation of orderly government." *Chambers*, 207 U.S. at 148. And, these concerns – unlike the free-speech right in *Connick* – exist without regard to the content of the petition (the complaint or claim), making a content-based restriction such as *Connick*'s public-private distinction particularly inapt.[5]

This Court has held that the constitutional concerns implicated by the free-speech right are not undermined if public employee speech is protected

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[5] Indeed, the constitutional interests relevant to determining any limits on public employees' rights differ even within the same constitutional provision. Thus, public employees have the right to be free from class-based discrimination under the Equal Protection clause, but not from class-of-one discrimination. *See Engquist*, 553 U.S. at 604. Similarly, public employees have a First Amendment right to political autonomy that precludes state requirements that they pay certain union dues, *see Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007), but no right to speech unless it contributes to debate on matters of public concern. *See Connick*, 461 U.S. at 147.

only when it addresses matters of public concern. But, the interests protected by the component of the petition right that ensures access to the state's adjudicatory processes would be severely damaged by this limitation. It eviscerates the petition right – and the purposes it serves – if the state can retaliate against those who use its own adjudicatory systems. This Court has observed that "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 548 (2001). The same vigilance is required when state and local governments retaliate against challenges brought by public employees.

II. THE GOVERNMENT'S INTERESTS ARE INSUFFICIENT TO JUSTIFY DEPRIVING PUBLIC EMPLOYEES OF THE RIGHT TO INVOKE THE STATE'S FORMAL ADJUDICATORY PROCESSES.

In part I, we showed that "the asserted employee right implicates the basic concerns of the relevant constitutional provision." *Engquist*, 553 U.S. at 600. Here, we show that "the realities of the employment context" do not justify depriving public employees of their constitutional right of access to the state's adjudicatory processes for complaints involving private matters, including employment-related claims. *Id.*

Like private employers, public employers have legitimate interests in managing employees and the workplace to effectively and efficiently accomplish the government's business. This Court has held that these interests justify certain limits on public employees' constitutional rights, some times requiring them to "give way to the requirements of the government as employer." *Id.* But, public

employers do not have a legitimate interest in retaliating against their employees who invoke the state's adjudicatory processes to address matters of private concern, including employment-related claims. Doing so is neither the general prerogative of private employers nor operationally necessary.

In virtually every federal and state law governing the employment relationship, one sees a reflection of the petition clause's prohibition of retaliation for the filing of complaints in courts or in administrative agencies. See, *e.g.*, *Gomez-Perez* v. *Potter*, 553 U.S. 474 (2008); *Jackson* v. *Birmingham Bd. Of Educ.*, 544 U.S. 167 (2005); *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442 (2008); *Robinson* v. *Shell Oil*, 519 U.S. 337 (1997); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969). The norm in both the public and private sector is that employers may not retaliate against employees who invoke the adjudicatory processes that the government establishes for the resolution of employment-related complaints. While private employers generally have the authority to discipline or discharge employees for disruptive or insubordinate speech (*Connick*, 461 U.S. at 147) or based on "subjective, individualized assessments" (*Engquist*, 553 U.S. at 603), they do not generally have the authority to discipline or discharge employees in retaliation for invoking the adjudicatory processes the state prescribes for the resolution of claims.

Contrary to petitioners (Br. 56), this virtual unanimity is no reason to limit the meaning of the petition clause. Instead, it demonstrates that public employers cannot reasonably claim that they will obtain any efficiency or effectiveness benefit if employees are denied the protection of the petition right here. Employers do not have a general right to

retaliate against employees who invoke the government's adjudicatory processes and public employers do not need this power to promote the public good. Indeed, the public good is undermined by such retaliatory conduct.

Second, a person's ability to invoke the state's judicial and administrative processes is essential to the effective enforcement of all other rights. Legal rights – including employment-related rights – cannot be enforced unless persons formally asserting their rights and seeking a remedy are protected from retaliation for doing so. See, *e.g.*, *Robinson*, 519 U.S. at 346 (fear of retaliation "deter[s] victims of discrimination from complaining"); *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("effective enforcement could thus only be expected if employees felt free to approach officials with their grievances"). Allowing the state, including public employers, to retaliate against those who invoke the state's adjudicatory processes constructively denies access to those processes. Indeed, this Court implicitly recognized the importance of the procedural right of access to the state's adjudicatory processes in limiting the Constitution's substantive application to public employees in *Engquist*. See 553 U.S. at 609 ("[p]ublic employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains"). It is, accordingly, critically important to provide constitutional protection to public employees' right of access to these processes.

Third, the conduct at issue in cases involving the right to access is the pursuit of a judicial or administrative claim. That conduct does not occur at the work place itself; it is confined to a procedure that the government offers to resolve disputes. Its whole

point is to prevent unmanageable conflict and disruption of the work place, and to channel disputes into a state-prescribed forum.

Fourth, petitioners and their *amici* (Pet. Br. 36; US Br. 14) claim that allowing this petition clause claim will turn every personnel decision into a potential constitutional claim, trying to force this case into the *Connick* and *Engquist* model. In fact, enforcement of the access component of the petition right does not remotely "constitutionalize" every employee complaint about governmental personnel decisions. *Connick*, 461 U.S. at 154. It forbids only retaliation based on employees' invocation of state-prescribed forums (and even then it protects an employee's suit only if it is not baseless, see *Prof'l Real Estate Investors*, 508 U.S. at 56). It does not otherwise purport to regulate a public employer's ability to take any personnel action based on that employee's speech or conduct within or outside of the work place. It does not protect speech or expressive conduct on private matters; it does not forbid arbitrary, "incorrect or ill-advised personnel decisions." *Bishop v. Wood*, 426 U.S. 341, 350 (1976).[6]

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[6] Petitioners insinuate that allowing Guarnieri's claim would create a "new constitutional cause of action," Br. 57, akin to the constitutional claim against the United States that the Court declined to imply in *Bush v. Lucas*, 462 U.S. 367, 388 (1983). But respondent's claim is not implied, it arises under a federal statute, section 1983, that is hardly new. Petitioners mischaracterize the nature of Guarnieri's claim in an effort to persuade the Court that he is seeking something extraordinary. In fact, it is petitioners who must demonstrate that the government's needs as employer are sufficiently substantial to require that public employees be deprived of a fundamental constitutional right.

Petitioners and their *amici* say, however, that any employee complaint can be framed as a legal claim, and therefore that clever employees might file claims (instead of speaking out) to preempt punishment for their complaints. Pet. Br. 42; US Br. 20. But, most employee complaints *follow* personnel action which necessarily means that the personnel action complained of cannot be in retaliation for that employee complaint. Put differently, a public employee has no claim to file unless the public employer takes some *additional action* against him or her in response to a non-frivolous invocation of an adjudicatory process.[7]

Plainly, it is always true that disallowing constitutional claims against public employers will save those employers time and money, at least in the short run. But the savings petitioners seek here would result from conduct that is anathema to core concerns of the First Amendment's petition clause. That is not a permissible trade off.

Finally, petitioners and their *amici* assert that protecting employees from retaliation for invoking the state's adjudicatory processes would give public employees rights superior to those enjoyed by their

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[7] Petitioners make the related claim that allowing public employees protection from retaliation for invoking state-prescribed procedures to address matters of private interest will dramatically increase public employers' litigation costs, because fewer employee complaints involving First Amendment retaliation will be dismissed at the outset of litigation. But, as petitioners noted, Pennsylvania law provides that police officers in boroughs cannot be fired except for reasons enumerated by statute, *see* 53 Pa. Stat. Ann. §§ 812, 46190 (Pet. Br. 54-55); those reasons do not include the filing of a lawsuit, administrative claim, or grievance. If the Borough retaliates against a police offer for filing such a complaint, it will incur defensive litigation costs.

private sector counterparts. See, e.g., Pet. Br. 38-39; US Br. 20. This is also true for public employees in relation to free-speech rights: A public employee has a protected right to speak on matters of public concern while a private employee does not. The critical question is not whether public and private employees are identically situated; it is whether the government as employer has some substantial efficiency interest that justifies abridging the public employee's constitutional right. Here the employer cannot reasonably claim such an interest. As noted above, as a practical matter, federal and state law virtually always forbids private employers to retaliate against employees for invocation of adjudicatory processes.

Equally critical, this Court has already held in numerous circumstances that private employers and employees have a constitutional right to petition the government by invoking judicial and administrative processes to address private matters related to employer-employee relations. In doing so, this Court has rejected the affected government's arguments that substantial public interests and concerns require the employer's and employees' petition right to "give way." *Engquist*, 553 U.S. at 600. Thus, in *Bill Johnson's Restaurants*, this Court refused to allow the National Labor Relations Board to hold that an employer's lawsuit against its employees was an unfair labor practice, even when the employer's intent was to interfere with its employees' federally-protected rights. 461 U.S. at 741. And, in *United Mine Workers*, 389 U.S. at 222, and *Brotherhood of Railroad Trainmen*, 377 U.S. at 7, this Court held that although the state's interest in regulating the legal profession and limiting attorney solicitation was important, in certain circumstances it unconstitu-

tionally burdened private employees' rights of access to the courts.

Thus, the access component of the petition right of private employers and employees is of sufficient importance that it cannot be constrained or limited even to enforce federal and state laws regulating the work place. In light of this authority, petitioners' argument – that "the realities of the employment context" require limits on the access right – cannot be correct.[8]

In sum, the government's interests in retaliating against public employees who invoke the state's own adjudicatory processes to redress grievances are minimal at best and counterbalanced by the state's interest in the effectiveness of its processes and the public's perception of their integrity. The government's interests certainly do not outweigh the "basic concerns" of the petition right which are directly implicated by the issue presented.

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[8] Petitioners also argue that the Court should not treat components of the right to petition differently because distinctions between petitions that implicate that right of access to adjudicatory processes and those that do not are difficult and unworkable. Pet. Br. 29. This case involves only access to state-prescribed processes; that line is easy to draw. But, petitioners say, it is difficult to determine when a public employee has invoked the right to access; for example, is expressing an intent to file a complaint sufficient? In fact, courts routinely make such determinations in assessing petition-clause claims. *See, e.g., Coastal States Mktg., Inc.* v. *Hunt*, 694 F.2d 1358 (5th Cir. 1983); *Glass Equip. Dev., Inc.* v. *Besten, Inc.*, 174 F.3d 1337, 1343-44 (Fed. Cir. 1999). The routine task of line-drawing provides no warrant for depriving public employees of their right to petition.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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